A.F.R. (169)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

WRIT PETITION NO.2234 OF 2003

Ashish Sharma and others

Versus

State of Chhattisgarh and others

POST FOR ORDER ON *18th August, 2003*

Sd/-
L.C.BHADOO
Judge

18 -08-2003

(170)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

WRIT PETITION NO.2234 OF 2003

PETITIONERS:

1. Ashish Sharma,
   Aged about 20 years,
   S/o Shri Ambika Sharma,
   R/o Street No.2, Mangla Road,
   Ganga Nagar, Bilaspur,
   Distt. Bilaspur (C.G.)

2. Yagneshwar Annavarpu,
   Aged about 18 years,
   S/o Shri A.R. Krishna Rao,
   R/o Mannu Chowk, Tikrapara,
   Bilaspur (C.G.)

3. Sunny Uttamani,
   Aged about 20 years,
   S/o Shri Gopal Uttamani,
   R/o Sector-1, Devendra Nagar,
   Raipur (C.G.)

4. Rahul Shah,
   Aged about 20 years,
   S/o Dr. Lalit Shah,
   R/o Main Road, Samta Colony,
   Raipur (C.G.)

5. Rajesh Agrawal,
   Aged about 22 years,
   S/o Shri Mohsham Agrawal,
   R/o Takhatpur,
   Distt. Bilaspur (C.G.)

Versus

RESPONDENTS:

1. State of Chhattisgarh,
   Through the Secretary,
   Department of Health, Family
   Welfare & Medical Education,
   D.K.S. Bhawan, Mantralaya,
   Raipur, Distt. Raipur (C.G.)

2. Director, Medical Education,
   Raipur (C.G.)

3. Dean, Medical College, Raipur (C.G.)

4. Richa Saxena, Rank 39/41

5. Himeshwari Verma, Rank 40/42

6. Jyoti Pandey, Rank 41/43

7. Meeraj Fatima, Rank 42/45

8. Shruti Dubey, Rank 44/47

9. Abhishree Gede, Rank 55/58

10. Aparna Barai, Rank 56/59

11. Neera Dash, Rank 61/64

Nos.4 to 11 all C/o Dean, Medical College, Raipur (C.G.)

Present: -

Mr. Prashant Mishra, Advocate: For the petitioners

Mr. Ravindra Shrivastava, Advocate General with Dr. N.K. Shukla, Additional Advocate General and Mr. Sanjay K. Agrawal, Deputy Advocate General: For respondents 1 to 3

Mr. J.D. Bajpayee and Mr. Arun Kochar, Advocates: For respondent No.9

ORDER

(Passed on 18th August, 2003)

L.C. Bhadoo, J

1. The petitioners appeared in the Pre Medical Test for admission to first year's M.B.B.S. course for the academic session 2003-2004 and secured 30th, 31st, 38th, 48th and 50th positions in the merit list prepared by the respondents, have questioned the legality, validity and propriety of the action of the respondents 1 to 3 by which the respondents after setting apart 30% seats for women candidates out of 42 seats meant for the open category, prepared general merit list. They have challenged that the action of respondents with regard to allocation of seats to women candidates is violative of the concept of horizontal reservation. Horizontal reservation for women in each of the category is under Article

15 (1) of the Constitution of India and not under Article 15 (4), which is meant for vertical reservation.

2. After preparation of scheme by the respondents for conducting the pre-medical entrance test, Chhattisgarh Madhyamik Shiksha Mandal, Pension Bada, Raipur, issued a notification along with brochure, inviting applications and for conducting the pre-medical entrance test 2003 for admitting the students into medical college, agriculture college and veterinary college in the State of Chhattisgarh. While issuing the brochure for the said examination the students were asked to apply in a prescribed proforma from 22.04.2003 to 11.05.2003. Chapter-2 of the brochure relates to rules for admission in medical and dental colleges. Rule 2 of Chapter-2 relates to the definitions. Sub-rule 2 of rule 2 defines that category means anyone category out of three categories i.e. Scheduled Castes (SC), Scheduled Tribe (ST) and Other Backward Classes (OBC). Sub-rule 3 of rule 3 defines the cadre (class), which says that anyone out of the three classes will form the cadre i.e. the soldiers, freedom fighters and women. Rule 3 prescribes the eligibility criteria for the students to appear in the examination. Sub-rule 3 of rule 3 prescribes the educational qualification for appearing in the examination. Sub-rule 4 of rule 3 prescribes the age; sub-rule 1 of rule 4 prescribes 15% seats for all India quota; and sub-rule 2 of rule 4 prescribes 3% seats for central pool. Sub-rule 4 of rule 4 prescribes that out of the remaining seats, 15% seats are reserved for SC; 21% seats are reserved for ST; and 14% seats are reserved (except crème lair) for OBC. Sub-rule 5 prescribes, horizontal reservation, 3% for Sainik category; 3% for freedom fighter cadre; and 30% for women cadre. Sub-rule 7 of rule 4 further lays down that on completion of the seats quota of soldiers, freedom fighters and women candidates, a merit list of eligible candidates will be prepared in their own category on the basis of the merit irrespective of cadre, and they will be kept at the right place. Sub-rule 9 further lays down that if sufficient number of soldiers, freedom fighters

and women cadre candidates are not available then the left out seats will be converted into without cadre seats. This rule further prescribes as to how the counselling shall take place and other procedure to be adopted for admitting the students.

3. On the basis of the break-up of the seats available for each of the category, 42 seats remained for unreserved candidates i.e. open category and on the basis of the horizontal reservation (30% reservation) 13 seats have been reserved for women in open category. One seat has been reserved for freedom fighters and one seat for Sainik woman. Being not satisfied with the merit list prepared by respondents 2 & 3, petitioner No.1 approached the Dean, Medical College, Raipur, who in turn informed petitioner No.1 that in accordance with the horizontal reservation for women candidates, firstly 13 seats have been set apart for open category women candidates out of 42 open category seats and for the remaining 27 seats, the merit list of 27 candidates has been prepared on the basis of their merit in the merit list from Serial Nos.1 to 27 irrespective of the fact whether they belong to SC, ST, OBC or general category, male or women candidates, and thereafter, from amongst the remaining candidates, 13 more women candidates have been selected considering that the reservation for women candidates were to be taken-up not from the first 27 candidates, but thereafter. In this manner, out of 42 unreserved/open category seats, 25 women candidates have been selected which means that the total reservation for women in the open category has reached more than 65%.

4. However, in the return filed on behalf of respondents 1 to 3, it has been stated that there is hierarchy in each of the categories i.e. reservation against reservation. For example, against the seats reserved for Scheduled Caste category, there is again reservation for soldiers, freedom fighters and women. Since, there is reservation against reservation, therefore, it is known as horizontal reservation. SC, ST and OBC constitute a separate compartment, then in each compartment there

is again three sub-compartments i.e. soldiers, freedom fighters and women. Apart from these categories, which are meant for the purpose of reservation, there is an unreserved category. In this unreserved category, the admission is made strictly in accordance with the merit and the persons belonging to SC, ST, OBC, soldiers, freedom fighters and women are entitled to be placed against this unreserved category, if they come within the common merit list. Unreserved category does not mean that it is only meant for males or it is meant for persons other than SC, ST, OBC, soldiers, freedom fighters and women. In fact, if it is exemplified with the word 'compartment' and in this compartment, every type of persons i.e. SC, ST, soldiers, freedom fighters and women shall be accommodated if he or she is meritorious. If this category is applied in the result of PMT examination held in 2003, the first 27 seats belonging to unreserved category is assigned as under: -

i. General - 20 seats including female.

ii. Female - 7 seats against OBC.

Out of these 20 general seats, 8 female candidates belonging to general category have become eligible and out of 7 OBC seats, 3 female candidates are eligible for admission. It is also worthy to mention here that highest marks obtained by Arun Iyer is a male candidate belonging to general category who has secured 783 marks, whereas, lowest marks obtained by Ajit Mishra is also a male candidate belonging to general category who has secured 744 marks. Thus, all the candidates who have become eligible for admission in the medical college against unreserved category have obtained marks between 783 and 744.

5. Almost similar reply has been filed by respondent No.9.

6. I have heard Mr. Prashant Mishra, counsel for the petitioners; Mr. Ravindra Shrivastava, Advocate General with Dr. N.K. Shukla, Additional Advocate General and Mr. Sanjay K. Agrawal, Deputy Advocate General for the State/respondents 1 to 3; and Mr. J.D. Bajpayee & Mr. Arun Kochar, counsel for respondent No.9.

7. In this petition the facts are admitted. The petitioners have questioned the procedure and the manner in which respondents 2 & 3 allocated the seats to female cadre candidates in the open category quota based on their horizontal reservation. As far as the rules position is concerned there is no dispute. Only a limited question has been raised in this petition i.e. regarding the allocation of seats to women candidates in open category based on horizontal reservation. The respondents while issuing brochure for conducting the examination of PMT 2003 for admission of the students to first year of M.B.B.S. course have prescribed vertical social reservation under Article 15 (4) of the Constitution of India to the extent of 50% for OC (open competition) candidates; 15% for SCs; 21% for STs; 14% for OBCs; and horizontal special reservation under Article 15 (1) of the Constitution of India to the extent of 30% for women candidates; 3% for freedom fighter cadre; and 3% for Sainik cadre, which is evident from sub-rules 4 & 5 of rule 4. The dispute in this petition is that respondents 2 & 3 while allocating 30% seats to women candidates based on horizontal reservation decided to first set apart 13 seats for women candidates out of 42 open category seats and thereafter, they prepared the merit of remaining 27 seats of open category leaving one seat for Sainik cadre and one for freedom fighter cadre, based on the merit position secured by the candidates. In this category, out of 27 seats, female candidates secured 12 seats on their own merit at position Nos.4, 5, 9, 11, 13, 14, 15, 17, 19, 20, 22 & 23 and these candidates were not counted against their 30% horizontal reservation quota reserved for female candidates.

8. The contention of the learned counsel for the petitioners is that this is not the spirit behind the horizontal reservation. According to his submission, the correct procedure for applying the horizontal reservation is that first respondents 2 & 3 ought to have prepared the list of all the 42 candidates based on their merit secured in the examination irrespective of the category and cadre they belong and if in the list of

those 42 candidates the quota of 13 women candidates of open category was already satisfied, then the respondents were not required to do anything more as 30% horizontal reservation made for (open category) women was already completed. If in case, in the merit list of 42 candidates, 13 (open category) women candidates were not admitted, then respondents 2 & 3 should have allowed the admission of next female candidates out of the merit list to make up and complete the quota of 13 women candidates by deleting equal number of candidates who were at the bottom of the merit list of 42 candidates. Therefore, the procedure adopted by respondents 2 & 3 is violative of Article 14 of the Constitution of India because by this procedure they have exceeded 50% quota and reservation has gone up to 65% instead of 50%, which is violative of the principle enunciated by the Hon'ble Supreme Court in the case of **Indra Sawhney etc. etc. vs. Union of India and others, etc. etc.**, reported in **AIR 1993 Supreme Court 477**.

9. On the other hand, the learned Advocate General submitted that the procedure adopted by respondents 2 & 3 was correct/perfect and there is nothing wrong in the system. He placed heavy reliance on the decision of the Apex Court in the case of **Ritesh R. Sah vs. Dr. Y.L. Yamul and others** reported in **AIR 1996 Supreme Court 1378** and argued that while giving 30% quota to female candidates the respondents are not required to include those female candidates in this 30% quota who had secured admission on the basis of their own merit obtained in the merit list in the open category quota i.e. those women candidates who had secured their position in the merit list among first 27 candidates cannot be included in 30% seats reserved for female candidates. The learned Advocate General also argued that special reservation could be made for women candidates as envisage in Article 15 (3) of the Constitution of India. For this purpose, he relied upon the decision of the Apex Court in the case of **Govt. of Andhra Pradesh vs. P.B. Vijaykumar and another** reported in **AIR 1995 Supreme Court 1648**. In this connection he also placed

reliance on the decision of the Apex Court in the case of **Asif Hameed and others vs. State of Jammu & Kashmir and others** reported in **AIR 1989 Supreme Court 1899**. The Hon'ble Apex Court in the case of **Govt. of Andhra Pradesh *(supra)*** held that special reservation can be made for women under Article 15 (3) of the Constitution of India.

10. In this case, the petitioners are not challenging 30% horizontal reservation prescribed for women candidates. Their only challenge is that 30% horizontal reservation made for women, compartment-wise, cannot be applied in the manner of vertical reservation which is meant for socially backward classes, otherwise, there will be no difference between vertical and horizontal reservation. Coming to the principle laid down by the Hon'ble Apex Court in the cases of **Ritesh R. Sah *(supra)*** and **Asif Hameed and others *(supra)***, these decisions are regarding vertical reservation and it has been held in these cases that if the SC, ST & OBC candidates are selected on their own merit in open category quota, then they will be considered as open category candidates and they cannot be counted against the reserved category based on vertical reservation. The petitioners have not raised any objection or disputed this fact regarding this position of law held by the Hon'ble Apex Court.

11. In order to appreciate the arguments of the learned counsel for the petitioners and the learned Advocate General, if we look into the scheme prepared by respondents 2 & 3 and published in the brochure issued for the admission of students, sub-rule 2 defines the category and categories have been defined as SC, ST & OBC. Sub-rule 3 of rule 2 defines the cadre i.e. Sainik, freedom fighter and woman. Sub-rule 4 of rule 4 lays down that 15% seats are reserved for SC; 21% seats are reserved for ST; and 14% seats are reserved for the OBC. Sub-rule 5 of rule 4 prescribes 30% horizontal reservation for women; 3% for soldiers; and 3% for freedom fighters. Sub-rule 7 of rule 4 prescribes that after the seats reserved for soldiers, freedom fighters and women candidates are

exhausted, the available eligible candidates shall be kept in their class in appropriate serial number without cadre.

12. Therefore, above rules show that while preparing the brochure, respondents 2 & 3 prescribed the category of SC, ST & OBC, whereas they put the female candidates in the cadre and made horizontal reservation for them and that has been made compartment-wise i.e. in each category. It is not disputed that this horizontal reservation has been made under Article 15 (1) of the Constitution of India and 50% vertical social reservation has been made under Article 15 (4) of the Constitution of India and separate cadre has been kept for women candidates as per sub-rule 3 of rule 2. So, from the very beginning, the intention of respondents 1, 2 & 3 was not to put women candidates on par with SC, ST & OBC based on vertical reservation. Therefore, the cadres which have been put in the horizontal reservation cannot be kept on par with the candidates of vertical reservation and they are not entitled to the same benefit which has been granted to the candidates of vertical reservation i.e. if any candidate belonging to SC, ST, OBC are selected on their own merit and they secure position in the open category list, then they cannot be counted against the reserved category quota i.e. 50% vertical reservation.

13. In view of decisions of the Hon'ble Apex Court in the cases of **Ritesh R. Sah** ***(supra)*** and **Asif Hameed and others** ***(supra)*** and looking to the horizontal reservation made for women candidates, I am of the opinion that the respondents are not entitled to first segregate 13 seats for women candidates out of 42 open category seats and then prepare the merit list of remaining 27 seats after excluding one seat for freedom fighters and one seat for soldiers irrespective of the category or cadre to which they belong. If this principle applies, then it is rightly argued by the learned counsel for the petitioners that this will exceed the 50% reservation quota and that will ultimately be detrimental to the open category candidates as the same is violative of the principle laid down by

the Hon'ble Apex Court in the case of **Indra Sawhney etc. etc.** ***(supra)*** as the reservation cannot be exceeded more than 50%. In other words, if that was the intention, then where was the necessity to make horizontal reservation for female candidates, as special reservation under Article 15 (1) of the Constitution of India.

14. In this connection, it is useful to look at the principle enunciated by the Hon'ble Apex Court in the case of **Anil Kumar Gupta and others vs. State of U.P. and others** reported in **(1995) 5 Supreme Court Cases 173.** After analyzing the position of vertical and horizontal reservation, the Apex Court observed that

> "The proper and correct course for filling the seats is to first fill up the OC quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/ accommodation should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen per cent in favour of special categories, overall, may be satisfied or may not be satisfied.)"

15. As has been mentioned above, in the present case, 30% special reservation for women has been made as compartmentalised horizontal reservation i.e. 13 female candidates are to be given admission out of 42 open category candidates. As per this principle, first, respondents 2 & 3 were required to prepare a full list of open category candidates and if in that list of 42 candidates of open category, 13 seats fixed for female candidates on the basis of horizontal reservation quota was already satisfied then there was no need to go further. In this case, it appears from the perusal of merit

list that number of general category female candidates have already secured their position in the merit list and the quota of 13 female candidates was already completed within first 39 seats as 39th candidate as per the merit list is a female candidate namely, Poornima Dhandale. Thus, 30% horizontal reservation made for female candidates in open category, compartment-wise, was already satisfied. Therefore, there was no occasion for the respondents to further set apart 13 seats for female candidates as their quota was already satisfied.

16. For this view, I also find support from the fact that while issuing the above brochure regarding the candidates for Bachelor of Veterinary Science, 30% horizontal reservation for women candidates was prescribed and the procedure for admission was laid down in rule 21 (1), in which it has been mentioned that while preparing the list, if any candidate of reserved category has secured his position on the basis of his merit in the open category, then that candidate will be considered in the open category and he will be given admission in the open category and quota of the reservation category will be kept as it is for other candidates of reserved category, whereas, this principle will not be applicable in the case of horizontal reservation. I further find support from the brochure issued for admission to medical courses in the year 2002. In that also similar procedure was adopted for women candidates, but this year (2003), how respondents 2 & 3 have changed the procedure, the reasons are best known to them.

17. In view of the above, I am of the opinion that the procedure adopted by respondents 2 & 3 i.e. first to set apart 13 seats for women candidates and then to prepare the list of remaining 27 seats of open category on the basis of the merit secured by the candidates irrespective of their category or cadre is not correct.

18. Therefore, the petition of the petitioners deserves to be allowed and the same is allowed. The procedure for giving admission to female candidates

adopted by respondents 2 & 3 is quashed. Respondents 2 & 3 are directed to prepare afresh the list of all the 42 open category candidates based on the merit secured by the candidates irrespective of category or cadre they belong and after preparation of that merit list, if the quota of 30% female candidates is satisfied, then the respondents are not required to undertake further exercise. However, if 30% quota of female candidates is not satisfied then, in order to make-up 30% quota of female candidates, the respondents should pick-up the remaining female candidates who have secured their position, in order of merit, after number 42 to adjust/accommodate against their reservation by deleting the corresponding number of candidates from the bottom of 42 open category candidates.

Sd/-
L.C.BHADOO
Judge

18/08/03